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In the

Supreme Court of the United States

October Term, 2000

YEI-HWEI TONG,

Petitioner Pro Se,

v.

DAVID RAY GUTIERREZ aka
DAVID GUTIERREZ, D. RUSSO,
JIM KERMODE, DAVID A. LAWTON,
THE CITY OF SAN GABRIEL

Respondents.

On Petition For Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should certiorari be granted to address claims that the Court of Appeals erroneously applied properly stated rules of law?

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STATEMENT OF THE CASE

A. Introduction

Yei-Hwei Tong brings this petition against David Ray Gutierrez, David A. Lawton and the City of San Gabriel, insisting that the Court of Appeals ignored certain issues and erroneously applied the law. Review by this Court, however, is not appropriate simply to correct claimed errors in the Court of Appeals' decision. (Sup. Ct. Rule 10.) Because this case presents no "compelling reasons" as required for review by this Court, the petition should be denied.

B. The Facts

On April 3, 1996, San Gabriel reserve officer David Ray Gutierrez stopped Tong's vehicle after he witnessed Tong making an illegal U-turn in a business district in violation of California Vehicle Code § 22102. During the course of the stop, Gutierrez requested Tong's driver's license and registration. Tong refused to comply; she became agitated, tried to exit her vehicle, and hit the officer in the chest with her car door, knocking him off balance. (At trial, Tong claimed she had told the officer her license was in the

trunk and that she was trying to get it; Gutierrez did not hear any such statement.)

As Gutierrez tried to put Tong back in her vehicle, Tong struggled against him, verbally challenging him, waiving her arms, and scratching him. Accordingly, Gutierrez placed Tong in a control hold, handcuffed her and tried to place her in the police vehicle. Tong continued to struggle against him and collapsed her legs underneath her, dropping to the ground rather than walk to the police car. (Tong claimed Gutierrez kicked her and that she fell.) Gutierrez called for back-up, and when it arrived, Tong was taken into custody and driven to the police station.[1]

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[1] Officer Kermode was the back-up. Officer Russo issued the Notice to Appear on the battery charge later filed against Tong. Neither officer was mentioned at trial; nor were Chief Lawton or San Gabriel except to identify the city in which the incident occurred and the title of the police department.

Tong was convicted of battery on a police officer. While that case was being appealed, Tong filed the instant action, pro se, alleging civil rights violations for excessive force against the three officers, Chief Lawton, and San Gabriel.

C. Proceedings Below

Tong filed her complaint on April 2, 1997, alleging civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985 and 1988, as well as the Fourth, Fifth and Fourteenth Amendments, arising from the routine traffic stop. Officers David Ray Gutierrez, Daniel Russo, James Kermode, Chief of Police David A. Lawton and the City of San Gabriel were named as defendants. On August 18, 1997, the District Court granted a motion to dismiss the complaint except for the § 1983 claims as against Gutierrez, Lawton and San Gabriel, with leave to amend.

On September 12, 1997, Tong filed a First Amended Complaint. On November 26, 1997, the District Court granted a second motion to dismiss, this time without leave to amend, again leaving only the § 1983 claims as against Gutierrez, Lawton and San Gabriel.

The case was set for trial on March 24, 1998 at a mandatory status conference. The defendants obtained a continuance of that date to allow for appeals of the criminal conviction to resolve. Tong later moved for a second continuance of the trial date based on an allegation that she had retained counsel who required time to prepare for the case. The trial was continued to July 21, 1998, in consideration of Tong's representation. However, counsel never substituted-in for Tong. After the matter trailed for several months in the District Court, the clerk paged the parties, including Tong, with 10-days' notice of trial starting May 11, 1999. Tong appeared for trial without counsel or an interpreter. (RT at 3:6-7.)[2]

At trial, Tong presented her own testimony describing the incident, her sister's testimony, attempting to show Tong had not

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[2] The second day of trial, Tong appeared with an attorney, who agreed to assist with the balance of trial, but did not purport to have been representing Tong any earlier, and did not object to Tong's having gone forward with the trial on her own the day before.

made a U-turn, and two doctors regarding injuries alleged. The defense presented the testimony of Gutierrez regarding the incident, and an expert in police procedure regarding the reasonableness of the force used. (RT at 60:7-8.74:3-4.) At the close of evidence, the defense moved for judgment for lack of evidence on the claims against all three defendants. That motion was granted as to Chief Lawton and San Gabriel, but denied as to Gutierrez. The remaining claim, a § 1983 claim against Gutierrez, was submitted to the jury, who returned a verdict against Tong. Final judgment was entered May 13, 1999.

On May 27, 1999, Gutierrez, Lawton and the City of San Gabriel filed a motion for attorney fees and costs pursuant to F.R.C.P. 54(d), 42 U.S.C. § 1988, 28 U.S.C. § 1961 and U.S.D.C Local Rule 7.1. An order denying attorney fees and granting trial costs was entered on June 24, 1999.

Tong appealed pro se both the District Court's judgment in her civil rights action (appeal no. 99-55998) and the District Court's order awarding costs to defendants (appeal no. 99-56352). In a memorandum opinion filed September 27, 2000, the Ninth Circuit

Court of Appeals affirmed the District Court's judgment (appeal no. 99-55998) and the order awarding costs (appeal no. 99-56352). (See Petitioner's Exh. A.)

Tong now brings this petition claiming this Court should grant certiorari because the Court of Appeals did not properly address certain issues raised by Tong in her appeal. The petition should be denied because none of Tong's claims rise to the level of "compelling reasons" sufficient for this Court to grant certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

Claimed Errors by the Lower Court Do Not Constitute "Compelling Reasons" for Certiorari.

This Court grants certiorari only "for compelling reasons." (Sup. Ct. Rule 10.) "Compelling reasons" generally include the resolution of important constitutional questions, the interpretation of federal statutes, and maintenance of harmony among the decisions of the Circuit Courts of Appeals and with state court interpretations of federal questions. (Sup. Ct. Rule 10.) This case presents none of these issues.

Tong's petition merely claims the Court of Appeals made erroneous findings and misapplied the law. Certiorari is not appropriate to review these claims. (Sup. Ct. Rule 10; *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122, 114 S.Ct. 1359, 1362 (1994) (achieving justice in particular case "is ordinarily not sufficient reason" for granting certiorari).

CONCLUSION

The decisions rendered below are free from error. Tong presents a persuasive (let alone compelling) reason that would justify intervention by this court. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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